Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GARY LYNN MILLER,
Petitioner,

v.

MICHAEL J. MILLER,
Respondent.

On Petition for Writ of Certiorari to the Fifth District Court of Appeal of the State of California

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a biological father has a protected liberty interest under the Due Process Clause of the 14th Amendment to the United States Constitution to assert and establish full parental rights to his child?

II. Whether a biological father of a child conceived during the marriage of his spouse to another is precluded from exercising his parental rights where the family unit established by the marital union no longer exists, and has been replaced by a new family unit consisting of the biological father, the mother of his natural child, and the child?

III. Whether the conclusive presumption that a child born to a married woman is the child of her husband, absolutely foreclosing a biological father's parental rights, violates the Due Process Clause and/or the Equal Protection Clause of the 14th Amendment to the United States Constitution?

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Respondent.

On Petition for Writ of Certiorari to the Fifth District Court of Appeal of the State of California

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PETITION FOR WRIT OF CERTIORARI

The petitioner Gary Lynn Miller respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fifth District Court of Appeal of the State of California entered in the above-entitled proceeding on May 22, 1998 and denied review by the California Supreme Court on August 19, 1998.

OPINIONS BELOW

The Opinion of the Court of Appeal of the State of California, Fifth Appellate District, is printed in Appendix B, page 2a, and reported as *Miller v. Miller*, 64 Cal. App.4th 111, 74 Cal.Rptr.2d 797, 98 Cal. Daily Op Serv. 3950, Daily Journal DAR 5438 (1998).

Review was denied by the California Supreme Court, August 19, 1998 Cal. Lexis 5559.

JURISDICTION

The Order After Hearing, printed in Appendix C, page 12a, attached hereto, which Petitioner seeks to have reviewed, is dated may 15, 1996, and was entered May 15, 1996. The Opinion and Disposition of the Fifth District Court of Appeal of the State of California, affirming this Order, printed in Appendix B, page 2a, attached hereto, is dated and entered May 22, 1998.

Review by the California Supreme Court was denied on August 19, 1998, as set forth in Appendix A, page 1a, attached hereto.

The jurisdiction of this Court is invoked under Section 1257(a) of Title 28 of the United States Code.

28 U.S.C. Section 2403(b) may apply.

FEDERAL AUTHORITY INVOLVED

1. Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Fourteenth Amendment to the United States Constitution:

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor shall deny to any person within its jurisdiction the equal protection of law.

STATEMENT OF THE CASE

On or about December 4, 1995, Petitioner filed his Complaint to Establish Paternity with the Superior Court of the State of California for the County of Madera. In the Complaint, Petitioner claims to be the natural, biological father of Samantha, whose mother, Lillian, is the former spouse of Respondent. Petitioner alleges that Respondent was erroneously mentioned as the natural father of Samantha in the judgment of dissolution of the marriage between Lillian and Respondent. In the third allegation of the Complaint, Petitioner states that blood tests have established that there is a 99.99% probability that he is the biological father. The results of this blood test were included as an Exhibit to his Complaint.

In addition to the blood test results, the Complaint avers to a close relationship between the Petitioner and Samantha. Petitioner describes his relationship with her as "strong." Petitioner states that Samantha knows he is her father and has addressed him as "Daddy" since 1992. When she stays with him and her mother, she has her own room with her clothes and toys. If she had her way, she would want full custody with Petitioner and her mother.

The Complaint further alleges that Petitioner married Samantha's mother on October 9, 1993. Lillian obtained a judgment of dissolution of her marriage to Respondent

after separating on or about November 6, 1991. Petitioner, who is the brother of Respondent, began living with Lillian shortly after her separation from Respondent. The Complaint goes on to state that the final decree of that dissolution proceeding provided that Lillian and Respondent have joint physical custody of the children. The parties to that proceeding were awarded an approximate fifty percent timeshare in custody, and a parenting plan has been followed since the mother's date of separation in 1991. Petitioner requested that he and Lillian receive full custody of Samantha.

Respondent filed his Motion to Quash on or about January 29, 1996. While various grounds were mentioned in the preamble to Respondent's Memorandum of Points and Authorities, the principal ground for his motion was that since Petitioner could not qualify as a presumed father under California Family Code section 7611, he did not have legal capacity to sue for paternity. Respondent expanded on this theme by stating that Petitioner had never held Samantha out to be his daughter, had not been ordered to pay child support for her, is not listed on her birth certificate as the father, and has not satisfied any of the conditions of California Family Code section 7611.

Petitioner's Reply to the Motion was filed on March 5, 1996, citing, in part, the constitutional issues presented in this Petition. As noted, above, the lower court issued its order granting the motion to quash. Petitioner appealed to the Fifth District Court of Appeals for the State of California. Petitioner argued, among other things, that the conclusive presumption of California Family Code section 7540 unconstitutionally deprived Petitioner of his right to assert paternity, an argument he had made at the trial court level.

The appellate court rendered its decision on May 22, 1998. It affirmed the trial court's determination on Peti-

tioner's Complaint. To the constitutional question pertinent to these proceedings, the California District Court of Appeals dismissed Petitioner's constitutional argument. The appellate court supported its ruling with a California case, *Michelle W. v. Ronald W.*, 39 Cal.3d 354 (1995), which held that the conclusive presumption of paternity in California Family Code section 7540 is consistent with due process. Furthermore, the court stated that the conclusive presumption serves important societal interests of maintaining the integrity of the family unit.

Petitioner then submitted his Petition for Review by the California Supreme Court, but review was denied on August 19, 1998. These proceedings follow.

REASONS FOR GRANTING THE WRIT

I. A BIOLOGICAL FATHER SHOULD HAVE A PROTECTED LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION TO ASSERT AND ESTABLISH FULL PARENTAL RIGHTS TO HIS NATURAL CHILD.

A. The Ability of a Putative Father to Assert and Establish Paternity Is Consistent Under This Court's Precedent.

Our law recognizes and affords constitutional protection to those relationships pertaining to marriage, procreation, contraception, family relationships, child rearing, and educational decisions. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851, 120 L.Ed.2d 674, 112 S.Ct. 2791 (1992). The Petition before the Court today is concerned with one aspect of these familial relations, hitherto not fully recognized by this Court—that relationship between a biological, putative father and his child living in another family unit.

This Court has had occasion in the past to confront the issue of the scope and extent of parental rights held

by putative fathers. The first such occasion was in *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972). In *Stanley*, the father had cohabitated with the childrens' mother for eighteen years and the children themselves had known the father all their lives. However, according to State law, there existed a statute consisting of a conclusive presumption that every father to a child born out of wedlock is an unfit parent. When the mother died, the State instituted dependency proceedings to make the children wards of the court. Relying on the state interest addressed in the statute, this Court held that it was better for the children to maintain a subsisting relationship with the family they all knew, rather than "uproot [the child] from the family which he knew from birth." *Id.*, at 654-655, n.7. This Court rightly held that the husband was derived of his rights under the Due Process Clause and ordered a reunification of the father with his children.

In *Quilloin v. Walcott*, 434 U.S. 246, 60 L.Ed.2d 511, 98 S.Ct. 549 (1978), this Court again recognized that a putative father has a due process right to acquire visitation rights for children he has sired, even when adoption proceedings have been commenced by the new husband of the childrens' mother.

In *Caban v. Mohammed*, 441 U.S. 380, 60 L.Ed.2d 297, 99 S.Ct. 1760 (1979), this Court again granted constitutional protection to the rights of an unwed father to maintain a relationship with his children. In that case, the unwed father's rights were upheld on equal protection grounds, primarily due to the putative father's sustained and unbroken relationship with his children. *Caban v. Mohammed, supra*, 441 U.S. at 383, 60 L.Ed.2d 297, 99 S.Ct. 1760. The Court clarified that rights under the Fourteenth Amendment accrue to those putative parents

who "come forward to participate in the rearing of his child." *Id.*, at 392, 60 L.Ed.2d, at 307, 99 S.Ct., at 1768.

In *Lehr v. Robertson,* 463 U.S. 248, 77 L.Ed.614, 103 S.Ct. 2985 (1983), the putative father filed a petition to open, vacate and/or set aside an order of adoption of his daughter born out of wedlock. There, the mother remarried eight months after the baby's birth, and the putative father infrequently provided financial support for or even saw his daughter. The Court rightly denied the putative father adoptive rights under the Fourteenth Amendment. Relying on the standard enunciated in *Mohammed,* this Court stated that the difference between this case and those preceding it was that in the preceding cases a significant bond had developed between putative parent and child, and that the putative parent freely assumed the responsibilities and duties of an otherwise normal parent. *Lehr v. Robertson, supra,* 463 U.S., at 261, 77 L.Ed.2d 614, 103 S.Ct. 2985. The putative father in *Lehr* shares none of those characteristics.

The last pronouncement of this Court in this area was in *Michael H. v. Gerald D.,* 491 U.S. 110, 105 L.Ed.2d 91, 109 S.Ct. 2333 (1989). In that case, Carole had a child while married to Gerald and during an on-again, off-again relationship with the putative father, Michael, and another male. She reconciled with Gerald, and lived with him and her child on a consistent basis. Michael believed and blood tests indicated that the child was fathered by Michael, and he attempted to assert his paternity rights. He was prevented from doing so because of the conclusive presumption of California Evidence Code section 621, the predecessor of the present-day Family Code section 7540. This statute states that a child is conclusively presumed to belong to an existing family unit to which it is born. Here, the conclusive presumption withstood the 14th Amendment challenge because the Court could find no tradition embracing the rights of an "adulterous

fathering of a child." *Id.*, 491 U.S., at 129, n.7, 109 S.Ct. at 2345, n.7.

The thread common to all these cases is that this Court is willing to recognize a protected liberty interest in asserting and establishing parental rights to those putative fathers who have demonstrated "full commitment to the responsibilities of parenthood," *Lehr v. Robertson, supra,* 463 U.S., at 261, 77 L.Ed.2d 614, 103 S.Ct. 2985, or where there is an enduring relationship between the putative father and the child or children, *Caban v. Mohammed, supra,* 441 U.S., at 397, 99 S.Ct., at 1770, or where the ultimate goal is to preserve a subsisting relationship with the child's father. *Stanley, supra,* 405 U.S., at 654. While a mere biological link is insufficient to warrant the creation of rights under the Fourteenth Amendment, *Lehr v. Robertson, supra,* 463 U.S., at 261, this Court has never hesitated to grant rights under the Fourteenth Amendment to fathers linked genetically, but torn from a family relationship by legal conventions. See, *Stanley, supra; Caban, supra; Lehr, supra.* Considering these characteristics, it is perhaps not surprising that this Court failed to grant full parental rights to the father in *Michael H.* There, the father exhibited none of the factors that this Court looks for before granting constitutional protection to those rights.

In the matter before the court, there exists none of the inherent instability in the relationships as in *Michael H.* that made this Court reluctant to recognize a protected liberty interest in Michael to gain parental rights. The record reveals that the Petitioner exhibits those qualities which this court has traditionally and historically found sufficient to give constitutional protection to custodial and parental rights. The Petitioner has developed a close and endearing relationship with his child over many years. *Caban v. Mohammed, supra,* 441 U.S., at 397, 99 S.Ct., at 1770. The child considers the Petitioner, and

not the Respondent, to be her real father. The Petitioner has consistently shown a commitment and devotion to the child. *Lehr v. Robertson, supra,* 463 U.S., at 261, 77 L.Ed.2d 614, 103 S.Ct. 2985. Moreover, upon learning the truth of her true parentage, Petitioner came forward and established a relationship with Samantha. *Caban v. Mohammed, supra,* 441 U.S., at 399 (dis.op., STEWART, J.) Under this precedent, there is no reason in logic or law why a putative father in the Petitioner's shoes should not enjoy a protected liberty interest in establishing his parental rights and acquire full custody of his natural child, Samantha.

II. A BIOLOGICAL FATHER OF A CHILD CONCEIVED DURING THE MARRIAGE OF HIS SPOUSE TO ANOTHER SHOULD NOT BE PRECLUDED FROM EXERCISING HIS PARENTAL RIGHTS WHERE THE FAMILY UNIT ESTABLISHED BY THE MARITAL UNION NO LONGER EXISTS, AND HAS BEEN REPLACED BY A NEW FAMILY UNIT CONSISTING OF THE BIOLOGICAL FATHER, THE MOTHER OF HIS NATURAL CHILD, AND THE CHILD.

A. This Case Addresses an Issue Reserved by This Court in *Michael H.*, When Faced With a Situation Where the Family Unit to Be Protected by the Conclusive Presumption no Longer Exists.

This court has already considered a situation similar, but in significant areas quite different to the present case. In *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L.Ed.2d 91, 109 S.Ct. 2333 (1989), the court confronted a situation wherein the putative natural father of a child attempted to assert his paternal rights and in doing so challenged, as here, the constitutional validity of California Evidence Code, section 621, the predecessor of the present-day Family Code section 7540. In *Michael H.*, the blood test performed on the putative father indicated that there was a 98.07% probability that he

was the natural father of the child in question. Here, a similar test performed on Petitioner indicated that there was a 99.99% probability that he is the biological father. The Court ultimately upheld the constitutionality of California Evidence Code section 621, presently Family Code section 7540, and in doing so found no deprivation of the putative natural father's constitutional rights to assert paternity of the child.

At the same time, the Court limited the pronouncement of the holding to the relevant facts of that case, stating:

> "It is at least possible that our traditions lead to a different conclusion with regard to adulterous fathering of a child whom the marital parents do not wish to raise as their own."

Michael H., supra, 491 U.S., at 129, n.7, 109 S.Ct., at 2345.

The facts of the case at bar fall precisely within the realm of possibility contemplated by footnote 7 of *Michael H.* because the relationship between the marital parents no longer exists.

The differences between Michael and the Petitioner are stark and significant. The biological father in *Michael H.* never married the child's natural mother, nor made any effort to marry her. See *Michael H., supra,* 491 U.S., at 114, 109 S.Ct., at 2337. Here, Petitioner married Samantha's natural mother after a long, close period of living together, and they remain happily married to this day. In *Michael H.,* a major concern of the Court was that Michael was unwed and in obtaining the visitation rights to the child would be breaking up a unitary family unit. Here, the child, Samantha, recognizes and considers Petitioner, not Respondent, as her true father. There is no "break up" of a family unit because there is no "family" to break up. By giving Petitioner full cus-

todial rights to Samantha, the court would be reestablishing and reuniting a family that has lived divided for several years.

B. A State Statute Precluding a Biological Father From Asserting Parental Rights Beyond Two Years After the Birth of His Child Is Unconstitutional.

Most significantly, in *Michael H.*, the putative father learned soon after the child's birth that he might be the father, and Michael had the opportunity to challenge the conclusive presumption within the statutory time period. Here, Petitioner did not learn that he was truly the father to Samantha until three years *after* her birth. Thus, applicable California law absolutely foreclosed for him the possibility to contest the conclusive presumption. Moreover, the manner in which California Family Code section 7540 is structured invites a deprivation of constitutional rights even for those willing to indicat ethose rights. Petitioner has been deprived of his parental rights not because they were knowingly waived or because he was not vigilant in defending those rights. The deprivation originated solely because he learned the true facts of Samantha's parentage beyond the two-year statutory limitations period found in Family Code section 7541.

It is of no moment that in our tradition there is no specific right accorded to the "adulterous fathering of a child" outside the family unit. See, *Michael H., supra,* 491 U.S., at 129, n.7, 109 S.Ct., at 2345, n.7. Freezing "due process of law" at some fixed stage of time or thought is to suggest that the fixing of these rights is a "function for inanimate machines and not for judges." *Rochin v. California,* 392 U.S. 165, 171-172, 96 L.Ed.2d 183, 72 S.Ct. 205 (1952). Rather, the fixing of rights under the Fifth and Fourteeth Amendment is a function of "reasoned judgment," which necessarily includes consideration of those traditions and history, but also of the full panoply of rights accorded to individuals, and other fac-

tors. *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra,* 505 U.S., at 849-850. Exercise of that judgment would conclude that in appropriate circumstances, putative fathers in Petitioner's place should be given those interests ordinarily accorded traditional family relationships.

III. THIS IS A CASE OF FIRST IMPRESSION, WHERE THE CONCLUSIVE PRESUMPTION THAT A CHILD BORN TO A MARRIED WOMAN IS THE CHILD OF HER HUSBAND ABSOLUTELY FORECLOSES A BIOLOGICAL FATHER'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND/OR THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court has never favored law by presumption when individual constitutional issues are at stake. The clearest statement by this Court on this subject is found in *Stanley* v. *Illinois.* There, this Court stated:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determination of issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important issues of parent and child. It cannot stand."

Stanley v. Illinois, supra, 405 U.S., at 657-658.

Stanley concerns an unwed father falling victim to a conclusive presumption that all unwed fathers are unfit, largely as a result of circumstances beyond his control. Here, as well, the Petitioner is a victim of California's conclusive presumption that children born to an existing family unit are those of that couple (except for circumstances not relevant here.) The Petitioner has fallen victim, as the biological father did under *Stanley,* due to circumstances beyond his control.

Under *Stanley*, however, there was no generalized limitation period in the State statute within which an interested party could challenge the conclusive presumption. Here, California law provides for blood tests to determine paternity, but they must be done within two years of the child's birth. Cal.Fam.Code, § 7541, subd. (b). Petitioner did not learn that he was the father to Samantha until *three years* after her birth. Accordingly, under this set of circumstances, applicable California law absolutely foreclosed for him the possibility to ever establish any parental rights with his daughter.

At its most basic level, the application of California's conclusive presumption in California Family Code section 7540 (formerly California Evidence Code section 621) "has the effect of placing a substantial obstacle in the path" of Petitioner's right to establish full custodial (i.e, parental) rights to his child. *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, 505 U.S., at 877. As this Court decided in *Casey*, "any statute which, . . . has [this] effect . . ., cannot be considered a permissible means of serving its legitimate interest." *Ibid.* Thus, unlike *Stanley* or *Michael H.*, where the procedural possibility existed for the father to challenge the statute, here Petitioner is foreclosed from establishing his parental rights *ab initio*, because he first learned of the facts needed to assert his parental rights outside the two-year period prescribed by California Family Code section 7541, subdivision (b).

In this respect, Petitioner's case represents a case of first impression, whether the 14th Amendment can tolerate the loss of constitutional rights as the result of the operation of an arbitrary, State-imposed time frame. It would be entirely consistent with this Court's precedent to answer this question in the negative. *Stanley* compels this conclusion. In such a way, the conclusive presumption of Family Code section 7540, as the Court has noted, refuses to allow men like the Petitioner the opportunity to prove

his paternity. See *Michael H., supra*, 491 U.S., at 149, 109 S.Ct., at 2349 (dis. op., BRENNON, MARSHALL, BLACKMUN, J). Certiorari, then, should be granted to resolve this situation.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully request this Court to grant that a Writ of Certiorari issue to review the judgment and opinion of the Fifth District Court of Appeal of the State of California, entered in the above-entitled proceeding on May 22, 1998 to settle and clarify the issues stated herein.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Aug. 19, 1998]

Fifth Appellate District No. F026405
S071615

IN THE SUPREME COURT OF CALIFORNIA

GARY LYNN MILLER,
Appellant

v.

MICHAEL J. MILLER,
Respondent

Appellant's petition for review DENIED.

/s/ George
Chief Justice

APPENDIX B

[Filed May 22, 1998]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

F026405

(Super. Ct. No. 57664)

GARY LYNN MILLER,
Plaintiff and Appellant,

v.

MICHAEL J. MILLER,
Defendant and Respondent.

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Edward P. Moffat, Judge.

STATEMENT OF THE CASE AND FACTS

During the marriage of respondent, Michael Miller, and Lillian Miller, three children were born to Lillian. The youngest child, Samantha, was born on May 9, 1989. Michael and Lillian separated on November 6, 1991.

Thereafter, Lillian began living with appellant, Gary Miller. Michael and Gary are brothers. According to Gary, Lillian told him in early 1992 that Samantha was his child.

The judgment dissolving the marriage of Michael and Lillian was entered on February 4, 1993, in Merced

County. The judgment granted Michael and Lillian joint legal and physical custody of the three children. The judgment provided "The children shall reside with Petitioner/Father except for specific periods of time . . . ." These time periods were set forth in detail in the judgment. Michael was further ordered to pay child support for the three children commencing December 1, 1992.

Lillian and Gary have been married since October 9, 1993, and live in Madera County. Between February 1993 and August 1995, Lillian filed three motions in the Merced County action seeking to modify the custody order so as to obtain sole physical and legal custody of the children. These motions were denied. Under the Merced County judgment, Samantha spends approximately 50 percent of her time with Lillian and Gary and approximately 50 percent of her time with Michael.

In December 1995, Gary filed the underlying complaint in Madera County to determine whether a parent and child relationship existed between Michael and Samantha. Michael was named as the defendant. Gary alleged he was Samantha's natural father and sought full legal and physical custody of Samantha. As an exhibit to this complaint, Gary attached "PARENTAGE/KINSHIP TEST RESULTS" prepared by a laboratory located in Seattle, Washington. Based on an analysis of blood samples taken from Gary, Lillian and Samantha, this laboratory concluded "that it is, for practical purposes, proven that Gary Miller is the biological father of Samantha Miller, assuming that no close biological relative could also be the father."

Michael responded by moving to quash the complaint pursuant to California Rules of Court,[1] rule 1230, on the ground that Gary lacked the legal capacity or standing to

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[1] All further rule references are to the California Rules of Court.

bring the paternity action. The trial court agreed. Based on the pleadings, arguments of counsel, and judicial notice of the Merced County dissolution action, the court ruled: (1) Gary did not have the legal capacity and standing to sue under Family Code [2] sections 7630 and 7611; (2) Michael was the natural father of Samantha pursuant to the Merced County judgment (§ 7636); and, (3) Gary had failed to establish he was the presumed father under section 7611. Consequently, the case was dismissed.

Gary contends the trial court erred in that he meets the requirements for presumed father status under section 7611; subdivision (d). Gary argues that, because the evidence supports a finding he received the child into his home and openly held her out as his natural child, he had standing to bring the paternity action under section 7630, subdivision (b), as an "interested party." Gary further asserts it was error to find Michael was Samantha's father based on the presumptions contained in the Uniform Parentage Act.

We will affirm the trial court's dismissal of this action on the grounds that Gary failed to both establish presumed father status and rebut the conclusive presumption of Michael's paternity.

DISCUSSION

The Motion to Quash was Procedurally Proper

It should first be noted that, contrary to Gary's position, Michael followed the proper procedure when he moved to quash the proceeding. Rule 1230, which applies to all actions and proceedings under the Family Code (rule 1205), provides that, within the time permitted to file a response, the respondent may move to quash the proceeding based on petitioner's lack of legal capacity to sue. Unlike other civil proceedings, the mo-

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[2] All further statutory references are to the Family Code, unless otherwise indicated.

tion to quash is not limited to jurisdictional challenges. (Cf. Code Civ. Proc., § 418.10.) Thus, here, Michael permissibly responded to the complaint by seeking to quash the proceeding on the ground Gary did not have standing to pursue an action to determine the existence or nonexistence of a father and child relationship under section 7630.

Further, Gary's concession that an extraordinary writ was the appropriate remedy for seeking review in this case is incorrect. Under rule 1232, subdivision (b), a trial court's order granting the motion to quash and dismissing the proceeding is appealable on "the question as to whether the court abused its discretion in making the order."

The Paternity Action was Properly Dismissed

On the merits, two hurdles exist which Gary must overcome before he can prevail. First, the trial court found Gary failed to establish presumed father status. Second, by virtue of section 7540, Michael is conclusively presumed to be Samantha's father. This presumption can be rebutted only under limited circumstances. (§ 7541.)

Section 7611 sets forth the conditions a man must meet before he is presumed to be the natural father of a child. In this case, Gary is relying on subdivision (d), the only subdivision which is potentially applicable. That subdivision provides a man is presumed to be the father of a child if he "receives the child into his home and openly holds out the child as his natural child."

Under section 7630, subdivision (b), any interested party may bring an action to determine the existence of the father and child relationship presumed under section 7611, subdivision (d). This is in contrast to section 7630, subdivision (a), which limits the class of men who can bring actions to declare the existence of the father and child relationship pursuant to section 7611, subdivisions (a),(b), and (c), to the presumed fathers. Thus,

a broad class of men, including " 'alleged' " fathers, can bring an action to establish paternity when such claim is based on the presumed father status which is obtained by receiving the child and openly acknowledging paternity. (*Robert J.* v. *Leslie M.* (1997) 51 Cal.App.4th 1642, 1646.) Therefore, Gary, as an interested party, had standing to pursue a claim premised on the section 7611, subdivision (d) presumption.[3]

However, in addition to finding Gary lacked standing to bring the action, the trial court determined Gary had failed to establish he was the presumed father under section 7611. Thus, the trial court found against Gary on the merits of his claim.[4] The trial court was correct. Based on the statutory presumptions, Gary cannot prevail on the merits as a matter of law.

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[3] In the recent case of *Dawn D.* v. *Superior Court* (1998) 17 Cal.4th 932, the California Supreme Court noted this contrast between section 7630, subdivision (a) and subdivision (b). There, the alleged biological father was attempting to establish the existence of a father and child relationship without having ever lived with the child. In this situation, the court stated that "arguably," the alleged biological father would qualify as an " 'interested' " party for purposes of bringing an action under section 7611, subdivision (d). (*Id.* at p. 938, fn. 5.) However, after raising this issue, it was unnecessary to resolve it. Unlike this case, in *Dawn D.* there was no factual basis to support an allegation of presumed father status under section 7611, subdivision (d).

[4] The trial court further found that, based on the Merced County dissolution judgment, Michael was the natural father of Samantha pursuant to section 7636. This section provides the judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes with one exception not applicable here. However, section 7636 refers to orders made pursuant to actions brought under section 7630. Thus, it is questionable whether the dissolution judgment naming Michael as Samantha's father is determinative by virtue of section 7636. (Cf. *County of Shasta* v. *Caruthers* (1995) 31 Cal.App.4th 1838, 1846-1847.) Nevertheless, it is unnecessary to decide this issue in ruling on this appeal.

To obtain the benefit of section 7611, subdivision (d), the man must establish by a preponderance of the evidence that the two elements necessary to invoke the presumption are present, i.e., reception into the man's home and an open and public acknowledgment of paternity. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652.) Thus, the burden of proof rested on Gary to demonstrate the existence of these two elements. It was for the trial court to determine whether these foundational facts were established by a preponderance of evidence. (*Id.* at p. 1653.)

Gary argues the trial court's finding that he failed to establish he was the presumed father is not supported by substantial evidence. In reviewing such a challenge, the appellate court must review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the order. "We do not reweigh the evidence but instead examine the whole record to determine whether a reasonable trier of fact could have found for the respondent." (*In re Spencer W.*, *supra*, 48 Cal.App.4th at p. 1650.)

Gary asserts he has established the first prong of the presumed father test in that Samantha lives with him approximately one-half of the time. Gary notes he and Lillian began cohabiting in November 1991, and he has received Samantha into his home since that time. Gary emphasizes that Samantha has her own room containing her toys and clothes in his home.

However, contrary to Gary's interpretation, this living situation does not support Gary's position. Samantha has lived with Gary approximately one-half of the time because Gary has been living with Samantha's mother, Lillian. As Samantha's stepfather, Gary would have Samantha in his home regardless of any paternity claim.

Gary argues he meets the second element required for presumed father status because ever since he learned of his paternity in 1991, he has continuously acknowledged

that Samantha is his child. However, the record belies this assertion.

The judgment dissolving Lillian and Michael's marriage, which listed Michael as Samantha's father and stated Samantha was to reside with Michael, was filed in February 1993. Although this judgment was entered over one year after Gary was told he was Samantha's father, Gary did not assert his paternity claim either before or at that time. Further, pursuant to the dissolution judgment, Michael pays child support for Samantha without objection from Gary. Finally, Gary waited until December 1995 to file the complaint to establish paternity, over six years after Samantha was born and over four years after allegedly being told of Samantha's parentage. These facts run counter to Gary's claim that he has openly held out Samantha as his child since 1991. Thus, the trial court's finding that Gary did not meet the requirements of section 7611, subdivision (d), is supported by substantive evidence.

Additionally, the conclusive presumption of paternity established by section 7540 applies to Michael. Under the facts of this case, Gary cannot employ the exception to this section to rebut the conclusive presumption. (§ 7541.)

Section 7540 states "Except as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." Section 7541, subdivision (a), allows this conclusive presumption to be rebutted by requiring the court to determine paternity in accordance with "the conclusions of all the experts, as disclosed by the evidence based on blood tests . . . ." However, section 7541, subdivisions (b) and (c) limit who may make a motion for blood tests to the husband, the child, the mother and the "presumed father" as defined in sections 7611 and require the motion to be filed not later than two years from the child's date of birth. Further,

the blood tests must be "made by experts qualified as examiners of blood types who shall be appointed by the court." (§ 7552.)

Gary concedes that Michael satisfies the conclusive presumption requirements of section 7540. Nevertheless, Gary contends he has rebutted this presumption through the blood test results he submitted as part of his complaint. However, these blood test results cannot override the conclusive presumption of section 7540 because the tests were not authorized by section 7541. The tests were neither ordered by the court nor performed by court appointed experts. (§§ 7551 and 7552.) As a result, these tests have no legal significance. Further, the tests were not performed within two years of Samantha's birth and thus were untimely. Finally, Gary does not have standing to request blood tests because, as discussed above, he is not a presumed father within the meaning of section 7611.

Therefore, the conclusive presumption of paternity applies to Michael as a matter of law. Consequently, whether or not Gary is in fact Samantha's biological father is immaterial. This conclusion reflects the ancient principle that " ' "[t]he husband is deemed responsible for his wife's child if it is conceived while they are cohabiting; he is the *legal* father and the issue of biological paternity is irrelevant." [Citation.]' " (*Susan H.* v. *Jack S.* (1994) 30 Cal.App.4th 1435, 1439.) This rule promotes important social policies including preservation of the integrity of the family and protection of the welfare of children. Especially pertinent here is the promotion of the state's interest " 'in preserving and protecting the developed parent-child and sibling relationships which give young children social and emotional strength and stability' " notwithstanding the termination of the mother's marital relationship with the presumed father. (*Susan H.* v. *Jack S., supra,* 30 Cal.App.4th at pp. 1442-1443.)

Gary further argues the presumption of paternity in favor of Michael deprives him of his substantive due

process right to establish that he is Samantha's biological father. However, a due process challenge to the conclusive presumption that the husband is the father of a child conceived during the marriage was rejected by the California Supreme Court based on strikingly similar facts in *Michelle W.* v. *Ronald W.* (1995) 39 Cal.3d 354.

In *Michelle W.* v. *Ronald W.*, the presumed father, Ronald, was married to the mother at the time of the child's birth and for four years thereafter. The couple divorced and the mother married the putative father, Donald. The dissolution judgment gave the mother primary custody of the child. Thus, the child lived in Donald's home and Donald held the child out to be his natural child. In this situation the court held that Donald's abstract interest in establishing he was the child's legal father was overridden by the established and continuing emotional and financial father-daughter relationship between the child and the presumed father. Consequently, the court concluded the application of the conclusive statutory presumption comported with the requirement of due process of law. (39 Cal.3d at pp. 363-364.)

Similarly, here, Michael has established an emotional and financial father-daughter relationship with Samantha. Thus, Gary's interest in establishing a parent and child relationship based on alleged biological father status is overridden by the state interests in familial stability and the best interest of the child.

Attorney Fees

Michael requests he be awarded attorney fees on the ground this appeal is frivolous. Michael argues the history of the case suggests an improper motive of harassment on the part of Gary. Alternatively, Michael submits the arguments make it clear that no reasonable attorney would have pursued this appeal.

Michael has not offered any specific evidence of objective bad faith. However, we have great concern about the impact this action may have had on Samantha's social and emotional well-being. We note that Gary instituted this action many years after Samantha established a strong parent-child relationship with her presumed father. Nevertheless, we will reluctantly defer to the trial court's finding that the "action was not frivolous, but done in good faith."

Further, although Gary cannot ultimately prevail on the merits of his complaint, he had a valid point on appeal. The trial court did not acknowledge Gary as an "interested party" under section 7630, subdivision (b). Thus, it is not clear that "any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Consequently, Michael's request for attorney fees is denied.

DISPOSITION

The judgment is affirmed. Respondent's request for attorney fees is denied; respondent is awarded costs on appeal.

/s/ Levy
LEVY, J.

WE CONCUR:

/s/ Ardaiz
ARDAIZ, P.J.

/s/ Stone (W.A.)
STONE (W.A.), J.

APPENDIX C

[Filed May 15, 1996]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MADERA

Case No. 57664

GARY LYNN MILLER,
Petitioner,

and

MICHAEL J. MILLER,
Respondent.

ORDER AFTER HEARING

A hearing was held on May 14, 1996, on issues related to the quashing of the proceedings. Petitioner was present with counsel, Michael Culy. Respondent was present with counsel, Babette Fischer. After arguments of counsel, the Court took the matter under submission.

Based upon the court file, the pleadings, arguments of counsel, and judicial notice of the Merced dissolution action, the Court makes the following rulings:

1) The Petitioner lacks the legal capacity and standing to sue. (*Family Code Section 7630 and 7611*).

2 Respondent is the natural father of Samantha pursuant to the Merced County judgment. (*Family Code Section 7636*).

3) Petitioner has failed to establish he is the presumed father under *Family Code Section 7611.*

Therefore, the Court grants the motion to quash and dismisses the case. Each side shall bear their own attorney fees and costs as the Court finds the action was not frivolous, but done in good faith.

DATED: May 15, 1996.

/s/ Edward P. Moffat
EDWARD P. MOFFAT
Judge of the Superior Court